

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

BITA TRADING, INC.,

Plaintiff,

vs.

NATIONWIDE MUTUAL  
INSURANCE COMPANY; ALLIED  
INSURANCE,

Defendants.

CASE NO. 13cv1548 JM(WVG)

ORDER GRANTING DEFENDANTS'  
MOTION FOR SUMMARY  
JUDGMENT; DENYING  
PLAINTIFF'S MOTION FOR  
SUMMARY JUDGMENT

Plaintiff Bita Trading, Inc. ("Bita") moves for partial summary judgment on its insurance coverage claim. Defendant Nationwide Mutual Insurance Company ("Nationwide"), also erroneously sued as Allied Insurance, seeks a declaration that there is no property coverage under the contract of insurance at issue. All motions are opposed. For the reasons set forth below, the court grants Nationwide's motion for summary judgment and denies Bita's partial motion for summary judgment. The Clerk of Court is instructed to enter judgment in favor of Defendants, and against Plaintiff, on all claims and to close the file

**BACKGROUND**

On May 24, 2013, Bita commenced this action in the California Superior Court, County of San Diego, by filing a form complaint alleging a single cause of action for breach of an insurance contract. On July 2, 2013, Nationwide removed the action to

1 this court based upon diversity jurisdiction. (Ct. Dkt. 1).

2 The following evidentiary facts are not disputed.

3 The Ground Lease

4 Bita owns real property located on Mira Mesa Boulevard in San Diego,  
5 California. Effective August 1, 2005, Bita entered into a Ground Lease with Sorrento  
6 Mesa Hand Car Wash & Spa, Inc. (“Sorrento”) for the construction and operation of  
7 a car wash and related facilities. The Ground Lease obligated Sorrento to maintain  
8 builder’s risk, property, liability, and business interruption insurance after the  
9 completion of the improvements. The lease also provided that Sorrento would  
10 designate Bita as an additional insured under the policies.

11 Bita and Sorrento became involved in a dispute over the property. On May 25,  
12 2012, the Superior Court of San Diego County terminated the lease, awarded monetary  
13 relief to Bita, and restored possession to Bita.<sup>1</sup> Bita asserts that Sorrento caused  
14 damage to the property in the amount of \$750,000. (Sheena Decl. ¶7). Bita also  
15 represents that only the car wash portion of the business opened on June 1, 2013, and  
16 that the remaining portions of the operations, consisting of a convenience store, office  
17 and oil change facility, have not been fully repaired and have not been fully placed in  
18 service. Bita also seeks to recover business interruption losses under the Sorrento  
19 insurance contract.

20 The Sorrento Policy

21 Nationwide issued policy No. ACP BPA 7824416814 to Sorrento for the period  
22 from March 22, 2012 through March 22, 2013. The policy consists of a Declarations  
23 sections followed by two major sections: a 39-page Premier Businessowners Property  
24 Coverage Form (The “Property Form”), setting forth the first party property coverage  
25 and a 22-page Premier Businessowners Liability Coverage Form (the “Liability  
26 Form”), setting forth the third party individual liability coverage. (Nationwide Exh.

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27  
28 <sup>1</sup> On June 29, 2012, the Sheriff restored possession to Bita.

1 1).<sup>2</sup>

2 The original Property Declarations page listed Sorrento as the only insured.  
3 (NW 00005, 00009). The Property Form also provided that certain payments would  
4 be made to mortgagees of the property. These entities are also listed as additional  
5 insureds. (NW 000010). The Property Form also provided coverage for the loss of  
6 business income.

7 The Liability Form provides liability insurance coverage for those sums the  
8 “insured becomes legally obligated to pay as damages because of ‘bodily damages’ or  
9 ‘property damages’ to which this insurance applies. . . .” (NW 000058). The Liability  
10 Form also extends insurance coverage for several categories of “Automatic Additional  
11 Insured.” One entity is “Managers or Lessors of Leased Premises” which provides, in  
12 pertinent part:

13 e. Managers or Lessors of Leased Premises

14 Any person or organization from whom you lease premises is an  
15 additional insured, but only with respect to their liability arising out of  
16 your use of that part of the premises leased to you, subject to the  
following additional exclusion:

17 This insurance, including any duty we have to defend “suits,” does not  
18 apply to structural alterations, new construction or demolition operations  
performed by or for such person or organization.

19 HOWEVER, their status as additional insured under this policy ends  
when you cease to be a tenant of such premises.

20 (NW000072). For purposes of liability coverage, Bitu, as the lessor of the property,  
21 was automatically an additional insured under this provision.

22 Effective for the policy period at issue, Nationwide provided Bitu, and its owner,  
23 Hosssien Javanfar, with an acknowledgment, on Form PBA102, of their “status as an  
24

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25 <sup>2</sup> Bitu objects to the insurance contract submitted by Nationwide as Exhibit 1.  
26 Bitu contends that the exhibit is not authentic for purposes of FRE 901. The court  
27 overrules this objection. The declaration of Lisa Sotelo states that she is an authorized  
28 representative of Nationwide, she reviewed the policy, states that the records are kept  
in the normal course of business, and that the exhibit is a true and correct copy.  
Nothing more is required to authenticate the exhibit. The court also accepts Bitu’s  
Exhibit C, page 17, a change of declaration endorsement, as an authenticated part of  
the insurance contract because this document is also authenticated by Ms. Sotelo.

1 additional insured under, . . . , the policy issued” to Sorrento. The acknowledgment  
2 noted that the Liability Form provided:

3 Any of the following persons or organizations are automatically insureds  
4 when you [i.e. the Named Insured stated below] and such person or  
5 organization have agreed in a written contract or agreement that such  
6 person or organization be added as an additional insured on your policy  
7 providing general liability coverage.

8 Managers or Lessors of Leased Premises

9 Any person or organization from whom you lease premises is an  
10 additional insured, but only with respect to their liability arising out of  
11 that part of the premises leased to you, subject to the following additional  
12 exclusion:

13 This insurance, including any duty we have to defend “suits,” does not  
14 apply to structural alterations, new construction or demolition operations  
15 performed by or for such person or organization.

16 HOWEVER, their status as additional insured under this policy ends  
17 when you cease to be a tenant of such premises.

18 (NW000111).

19 Two other documents are pertinent to Bitá’s claim that it was an additional  
20 insured under the Sorrento policy. The first document is a Certificate of Insurance.  
21 The second, the Change of Declarations Endorsement page, in a subheading entitled  
22 “Additional Insured,” noted that Hossien Javanfar and Bitá were added as additional  
23 insureds for no extra premium. (Bitá Exh. C at p.17). This section of the Change of  
24 Declarations Endorsement page also specifically incorporated Form PBA102, the form  
25 that specified that the additional insureds were covered for purposes of the Liability  
26 Form only. On the same page of the Change of Declarations Endorsement, and  
27 separated by a line of asterisks, the form stated “Mortgagee or Loss Payee.” This  
28 section identified the mortgagee, Pacific Western Bank, the same mortgagee identified  
in the Property Form.

Bitá moves for partial summary judgment by arguing that it is an additional  
insured under the Property Form.<sup>3</sup> Bitá also argues that it is covered under the Property  
Form for business interruption losses but that summary judgment is inappropriate on

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<sup>3</sup> There is no dispute that Bitá is an additional insured under the Liability Form.

1 this claim because the total amount of business income loss is on-going and therefore  
 2 an unknown amount. Nationwide opposes Bitá's motion and argues that it is entitled  
 3 to summary judgment because Bitá is not an additional insured for purposes of the  
 4 Property Form.

## 5 **DISCUSSION**

### 6 **Legal Standards**

#### 7 Motion for Summary Judgment Standards

8 A motion for summary judgment shall be granted where "there is no genuine  
 9 issue as to any material fact and . . . the moving party is entitled to judgment as a matter  
 10 of law." FED. R. CIV. P. 56(c); Prison Legal News v. Lehman, 397 F.3d 692, 698 (9th  
 11 Cir. 2005). The moving party bears the initial burden of informing the court of the  
 12 basis for its motion and identifying those portions of the file which it believes  
 13 demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett,  
 14 477 U.S. 317, 323 (1986). There is "no express or implied requirement in Rule 56 that  
 15 the moving party support its motion with affidavits or other similar materials negating  
 16 the opponent's claim." Id. (emphasis in original). The opposing party cannot rest on  
 17 the mere allegations or denials of a pleading, but must "go beyond the pleadings and  
 18 by [the party's] own affidavits, or by the 'depositions, answers to interrogatories, and  
 19 admissions on file' designate 'specific facts showing that there is a genuine issue for  
 20 trial.'" Id. at 324 (citation omitted). The opposing party also may not rely solely on  
 21 conclusory allegations unsupported by factual data. Taylor v. List, 880 F.2d 1040,  
 22 1045 (9th Cir. 1989).

23 The court must examine the evidence in the light most favorable to the non-  
 24 moving party. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962). Any doubt  
 25 as to the existence of any issue of material fact requires denial of the motion. Anderson  
 26 v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). On a motion for summary judgment,  
 27 when "the moving party bears the burden of proof at trial, it must come forward with  
 28 evidence which would entitle it to a directed verdict if the evidence were

uncontroverted at trial.” Houghton v. South, 965 F.2d 1532, 1536 (9th Cir. 1992) (emphasis in original) (quoting International Shortstop, Inc. v. Rally's, Inc., 939 F.2d 1257, 1264-65 (5th Cir. 1991), cert. denied, 502 U.S. 1059 (1992)).

#### General Insurance Law Principles

Ordinary rules of contract interpretation apply to insurance contracts. “The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties. If the contractual language is clear and explicit, it governs.” Bank of West v. Superior Court (Industrial Indemnity Co.), 2 Cal. 4th 1254 (1992). Where exclusions are clear, plain, and conspicuous, they will be enforced. Malcolm v. Farmers New World Life Ins. Co., 4 Cal.App.4th 296, 3045 (1992).

#### **The Property Form**

Bitra argues that it was an additional insured under the Sorrento policy because (1) the Ground Lease with Sorrento required Sorrento to insure Bitra against losses caused by property damage and business interruption; (2) the Certificate of Insurance evidences its status as an additional insured under the Property Form; and (3) the Change of Declarations Endorsement evidences coverage under the Property Form. Each is discussed in turn.

#### The Ground Lease

Bitra argues that the Ground Lease required Sorrento to maintain builder’s risk insurance as well as property, liability, and business interruption insurance. (Bitra Exh. A). While this fact is undisputed, it has no bearing on whether Bitra is an additional insured for purposes of the Property Form. Whether Bitra is an additional insured depends on the insurance contract, and not the Ground Lease.

In sum, the ground lease is not relevant to Bitra’s breach of the Property Form and its claim against Nationwide.

#### The Certificate of Insurance

Sorrento’s insurance broker, Kennedy Insurance Agency, Inc., provided Bitra with a Certificate of Insurance. The Certificate of Insurance states, in the Description

1 of Operations/ Locations/ Vehicles section:

2 Certificate holder (identified as Hossien Javanfar - Bitra Trading Co.) is  
3 named as additional insured (land owner) with respect to building,  
4 business personal property and general liability in accordance with loan  
#18755681 with Pacific Western Bank.

5 (Bitra Exh. D). The first provision on the Certificate of Insurance states:

6 THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION  
7 ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE  
8 HOLDER. THIS CERTIFICATE DOES NOT AFFIRMATIVELY OR  
9 NEGATIVELY AMEND, EXTEND OR ALTER THE COVERAGE  
AFFORDED BY THE POLICIES BELOW. THIS CERTIFICATE OF  
INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE  
ISSUING INSURER(S), AUTHORIZED REPRESENTATIVE OR  
PRODUCER, AND THE CERTIFICATE HOLDER.

10 Id. Furthermore, the Certificate provides "If the certificate holder (Bitra) is an  
11 ADDITIONAL INSURED, the policy(ies) must be endorsed." Id.

12 Moreover, California law provides that certificates of insurance may not alter the  
13 terms of an insurance contract. Insurance Code section 384(a) provides, in pertinent  
14 part:

15 A certificate of insurance or verification of insurance provided as  
16 evidence of insurance in lieu of an actual copy of the insurance policy  
shall contain the following statements or words to the effect of:  
17 This certificate or verification of insurance is not an insurance policy and does  
18 not amend, extend or alter the coverage afforded by the policies listed herein.  
19 Notwithstanding any requirement, term, or condition of any contract or other  
document with respect to which this certificate or verification of insurance may  
be issued or may pertain, the insurance afforded by the policies described herein  
is subject to all the terms, exclusions and conditions of the policies.

20 In light of the plain language of the Certificate of Insurance and Cal. Ins. Code §384(a),  
21 the Certificate of Insurance confers no rights to Bitra that are not contained in the  
22 Sorrento policy issued by Nationwide. See Pardee Construction Co. v. Insurance Co.  
23 of the West, 77 Cal.App.4th 1340, 1347 n.2 (2000) (a certificate of insurance is not a  
24 contract between the insurer and the certificate holder). As Bitra is not identified as an  
25 additional insured for purposes of the Property Form, as more fully discussed below,  
26 the Certificate of Insurance does not support Bitra's argument that it is an additional  
27 insured under the Sorrento policy.

28 Bitra argues that American Casualty Co. of Reading, PA v. Krieger, 181 F.3d



1 1113 (9th Cir. 1999), supports its position that the Certificate of Insurance evidences  
 2 its status as an additional insured for all purposes under the policy. Krieger is  
 3 distinguishable in at least two ways. First, the Certificate of Insurance at issue in  
 4 Kreiger apparently did not contain two specific advisements contained in the  
 5 Certificate at issue here: “THIS CERTIFICATE OF INSURANCE DOES NOT  
 6 CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURER(S),  
 7 AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE CERTIFICATE  
 8 HOLDER” and “If the certificate holder (Bita) is an ADDITIONAL INSURED, the  
 9 policy(ies) must be endorsed.” As set forth below, the endorsement transmitted with  
 10 the Certificate was accompanied by form PBA102, specifically limiting Bita’s status  
 11 as an additional insured for purposes of liability coverage only. Second, the relevant  
 12 issue with respect to the certificate of insurance in Kreiger dealt with agency principles,  
 13 an argument not raised by Bita herein.

14 In sum, the Certificate of Insurance does not support Bita’s breach of contract  
 15 claims against Nationwide.

#### 16 The Policy

17 Here, the Property Form recognizes Sorrento as the insured, and no other party.  
 18 The only insured party, as identified in the policy, is Sorrento. (NW000005).  
 19 Similarly, the schedule of named insureds only identifies Sorrento. (NW000006).  
 20 Additional insureds include mortgagees that are listed as additional insureds under the  
 21 policy. (NW000010). Sorrento is not listed as a mortgagee. The only other issue is  
 22 whether there is another contractual basis or ambiguity to find that Bita is an additional  
 23 insured for purposes of the Property Form.<sup>4</sup>

24 Bita claims that the Change of Declarations Endorsement supports its claim that  
 25 it is an insured for purposes of the Property Form. (Bita Exh. C p.17). The Change of  
 26 Declarations Endorsement is divided into two sections. The first section, with a

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27  
 28 <sup>4</sup> The parties do not dispute that Bita is an additional insured for purposes of the  
 Liability Form. The Liability declarations page identifies Managers or Lessors, like  
 Bita, as automatic additional insureds. (NW000011, 0000111).



1 subheading entitled “Additional Insured,” identifies Hossien Javanfar - Bitá and  
 2 specifically adds Form PBA102. Form PBA102 accompanied the Change of  
 3 Declarations Endorsement and clearly and unambiguously states that Bitá is an  
 4 additional insured for purposes of the Liability Form.<sup>5</sup>

5 The second portion of the Change of Declarations Endorsement, separated by a  
 6 line of asterisks with a subheading entitled “Mortgagee or Payee,” identifies the  
 7 mortgagee as Pacific Western Bank, Inc. Id. This is the same lender identified on the  
 8 Property declarations. Seen in context of the insurance contract and the documents  
 9 comprising the Change of Declarations Endorsement and the Acknowledgment of  
 10 Insured Status Form (PBA102), the policy and its provisions are not ambiguous  
 11 because Bitá’s proposed construction is simply not a reasonable one. See Bay Cities  
 12 Paving and Grading, Inc. v. Lawyers Mutual Ins. Co., 5 Cal.4th 854, 867 (1993) (“A  
 13 policy provision will be considered ambiguous only when it is capable of two or more  
 14 constructions, both of which are reasonable.”). The only reasonable interpretation is  
 15 that Bitá is an additional insured for purposes of the Liability Form, but not the

16  
 17 <sup>5</sup> Form PBA102 provides that Bitá is an additional insured for purposes of the  
 18 Liability Form:

19 Any of the following persons or organizations are automatically insureds  
 20 when you [i.e. the Named Insured stated below] and such person or  
 21 organization have agreed in a written contract or agreement that such  
 22 person or organization be added as an additional insured on your policy  
 23 providing general liability coverage.

24 Managers or Lessors of Leased Premises

25 Any person or organization from whom you lease premises is an  
 26 additional insured, but only with respect to their liability arising out of  
 27 that part of the premises leased to you, subject to the following additional  
 28 exclusion:

This insurance, including any duty we have to defend “suits,” does not  
 apply to structural alterations, new construction or demolition operations  
 performed by or for such person or organization.

HOWEVER, their status as additional insured under this policy ends  
 when you cease to be a tenant of such premises.

(NW000111).

1 Property Form.

2 Bitu appears to argue that the court should begin and end its analysis of the  
3 Change of Declarations Endorsement upon encountering the words “Additional  
4 Insured.” This narrow view runs counter to rules of contract interpretation. “While  
5 insurance contracts have special features, they are still contracts to which the ordinary  
6 rules of contractual interpretation apply.” Bank of the West v. Superior Court, 2  
7 Cal.4th 1254, 1264 (1992). “The rules governing policy interpretation require us to  
8 look first to the language of the contract ... to ascertain its plain meaning or the  
9 meaning a layperson would ordinarily attach to it.” Waller v. Truck Ins. Exchange,  
10 Inc., 11 Cal.4th 1, 18 (1995). “[L]anguage in a contract must be construed in the  
11 context of that instrument as a whole, and in the circumstances of that case, and cannot  
12 be found to be ambiguous in the abstract.” Bank of the West, 2 Cal.4th at 1265. Here,  
13 in the Change of Declarations Endorsement under the heading “Additional Insured,”  
14 the document states “Added” and identifies Bitu, Hossien Javanfar, and PBA102.  
15 Viewing this language in context of the Change of Declarations Endorsement section  
16 in which it appears, and the insurance contract as a whole, the only reasonable  
17 interpretation is that Bitu is an additional insured for purposes of the Liability Form,  
18 but not the Property Form. The court concludes that the Change of Declarations  
19 Endorsement is not reasonably susceptible to Bitu’s proffered interpretation and  
20 therefore not legally ambiguous. This is particularly true in light of the parties’ relative  
21 sophistication. See AIU Ins. Co. v. Superior Court, 51 Cal.3d 807, 823 (1990) (in  
22 insurance policy disputes involving sophisticated parties, noting that the court need not  
23 construe the policy as may be understood by a layperson).

24 At the time of oral argument, Bitu argued that Lee v. Fidelity National Title Ins.  
25 Co., 188 Cal.App.4th 853 (2010) supports its view that the insurance documents are  
26 sufficiently ambiguous such that it is insured for all property and liability losses. In  
27 Lee, the plaintiffs purchased property in 1990 that was identified by two tax assessor  
28 parcel numbers. Fidelity issued a preliminary report that “referred repeatedly to both


1 assessor parcels, and included a legal description of the property to be insured.” Id. at  
2 751. Further, the preliminary report identified both parcel numbers as the property  
3 address and unpaid taxes on both properties. The plaintiffs paid property taxes on both  
4 properties. While the parcel number references were not incorporated into the policy,  
5 “the policy attached a map; depicting the two parcels.” In 2006 plaintiffs learned from  
6 the county assessor that the legal description in the title insurance was correct but that  
7 the plaintiffs only owned one of the two parcels contrary to the preliminary report. The  
8 county assessor also represented that it had erroneously assessed the taxes for both  
9 parcels on plaintiffs. When plaintiffs made a claims against Fidelity, it denied  
10 coverage on the ground that the legal description in the title insurance policy was  
11 correct. The appellate court noted that the metes and bounds legal description,  
12 although correct, was one that “required professional training to decipher.” Id. Noting  
13 that an insured “can rely on a preliminary [title] report to reflect the scope of the  
14 coverage being offered,” id. at 596, and noting the repeated references to both parcel  
15 numbers as the property description in the preliminary report, the court found plaintiffs  
16 had an “objectively reasonable expectation” of coverage. Id. at 597. The court then  
17 determined that “the legal description here is ambiguous only because of the  
18 circumstances under which the policy was issued, which involve a preliminary report  
19 that could be reasonably construed as an offer to insure property located outside the  
20 land described.” Id. at 598. The appellate court then reversed the trial court’s grant of  
21 summary judgment in favor of the insurer.

22 Here, unlike Lee, Bitra cannot identify circumstances warranting a determination  
23 that the insurance documents are reasonably ambiguous. The ordinary sense of the  
24 policy and the Change of Endorsement Declaration, including the incorporation of  
25 PBA102 into the Declaration, reveal that Bitra is an additional insured for purposes of  
26 liability coverage, but not property coverage. Bitra’s proposed construction, in light of  
27 the clear and explicit meaning of the insurance policy provisions, is not a reasonable  
28 one.

1 In sum, the court concludes that the Property Form does not provide coverage  
2 for the property losses (and business interruption losses) suffered by Bita because it is  
3 not an additional insured under the Property Form. Accordingly, the court grants  
4 summary judgment in favor of Defendant Nationwide and against Plaintiff Bita on the  
5 claim alleged in the complaint. The Clerk of Court is instructed to enter judgment and  
6 to close the file.

7 **IT IS SO ORDERED.**

8 DATED: January 6, 2014

9   
10 Hon. Jeffrey T. Miller  
United States District Judge

11 cc: All parties  
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